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Volkswagen of America, Inc.



December 6, 2001

Dr. Jeffrey Runge
Administrator
National Highway Safety Administration
Washington, D.C. 20590

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DEPT. OF TRANSPORTATION
DOCKET

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RE: Reporting of Information About Foreign Safety Recalls and Campaigns
Related to Potential Defects; Notice of Proposed Rulemaking (66
Fed.Reg. 51907; October 11, 2001); Docket No. NHTSA-2001-10773, -3
Notice 1

Dear Dr. Runge:

Volkswagen AG, Audi AG, and Volkswagen of America, Inc. (collectively
"Volkswagen Group," "VW Group," "Volkswagen," or "VW") respectfully submit these
comments regarding the NPRM issued on October 11, 2001 (66 Fed.Reg. 51907)
(hereinafter "NPRM").

Volkswagen is a full member of the Alliance of Automobile Manufacturers
("Alliance"). Volkswagen has participated in the comments submitted hereto separately
by the Alliance and fully supports that submission to the docket for this NPRM.

The Volkswagen Group is the largest European automobile manufacturer. It
markets and distributes motor vehicles worldwide under numerous brand names,
including Volkswagen, Audi, Seat, Skoda, Rolls-Royce, Bentley, and Lamborghini. The
Volkswagen Group maintains manufacturing facilities in numerous countries, and exports
motor vehicles and motor vehicle parts into approximately 160 countries worldwide. The

VW Group has no financial interest or ownership in most of the independently owned importers of these motor vehicles.

Volkswagen Group products are imported into the United States by Volkswagen of America, Inc. (“VWoA”), a New Jersey corporation; Rolls-Royce & Bentley Motorcars, Inc., a Delaware corporation; and Lamborghini S.p.A., an Italian corporation. VW brand products imported into the United States originate in Germany, Brazil, and Mexico. Audi brand products imported into the United States originate in Germany and Hungary. Rolls-Royce and Bentley brand products imported into the United States originate in the United Kingdom. Lamborghini brand products imported into the United States originate in Italy.

1. The U.S. Constitution and Established Case Law Require Legal Certainty

From the Volkswagen Group’s perspective, the proposed rule should establish an effective, manageable reporting information system, which incorporates administrative law principles of requirements not “unduly burdensome to manufacturers or the Secretary” (*see also* Section 3(b) of the TREAD Act), and whose requirements are clear, with objective definitions of the information to be provided under Section 3(a) of the TREAD Act, so that (1) constitutional due process concerns of legal certainty are met and (2) manufacturers and personnel responsible for gathering and reporting information coming from countries throughout the world know exactly what is required of them. The substantial new penalties provided by the TREAD Act for failing to report required information make it essential that such clear, objective definitions be established.

As you know, NHTSA, as a Federal agency, is bound to uphold constitutionally safeguarded principles of legal certainty. As recently as 1998, NHTSA was found to have violated constitutional protections of due process by failing to provide adequate notice to manufacturers (*see* U.S. v. Chrysler, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (holding that due process principles and the Vehicle Safety Act itself protect vehicle manufacturers

from being found out of compliance with the Act if NHTSA has failed to give fair and adequate notice of what is required).¹ In this case, the Court of Appeals for the District of Columbia held that the Vehicle Safety Act itself specifies that, before a manufacturer can be found in noncompliance, NHTSA must prove that a reasonable person, exercising reasonable care, would have known that the vehicle did not comply with the applicable standards (*id.* at 1355 (quoting 49 U.S.C. § 30112(b)(2)(A) (1994)). As NHTSA completes this rulemaking, Volkswagen urges that NHTSA be guided by the principles articulated in case law; namely, that regulations issued pursuant to the Vehicle Safety Act, including its TREAD amendments, comply with the principles of legal certainty by embodying clear and objective standards.

Against this background, VW is particularly concerned about the NPRM's vague and unclear standards of what constitutes a: (1) "substantially similar" vehicle and (2) "manufacturer." Finally, VW urges NHTSA to adopt the Alliance's flexible approach to the five-day reporting requirement in order to appropriately reflect the realities associated with overseas information gathering, translating, and reporting.

2. Definition of "Substantially Similar" Vehicle

Constitutional protections afforded by the fourteenth amendment (due process clause) as enunciated in *Chrysler* and other case law (described in section 1 above; *see also* footnote 1) require a clear, objective definition of "substantially similar" vehicle, in particular because this definition frames the scope of the rule's application. The

¹ Constitutional due process also requires agencies overseeing other industries to assure legal certainty. *See, e.g.,* General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) (finding that petitioner could not be held liable for violating EPA regulation that was "unclear") and PMD Produce Brokerage Corp. v. U.S. Dep't of Agriculture, 324 F.3d 48 (D.C. Cir. 2000) (finding decision of Agriculture Department "arbitrary and capricious" where it relies on an underlying "ambiguous" regulation to file a complaint).

Volkswagen Group fully supports the comments submitted on this point by the Alliance. In addition, VW wishes to add the following comments.

First, the Volkswagen Group believes that the fourth of the five-part definition proposed in the NPRM is unconstitutionally vague, ambiguous, and unworkable. The meaning of the term “counterpart” is unclear in the context of the definition, and it is not a term of art in the automotive industry. To that extent, it likely violates constitutional mandates, as discussed in *Chrysler* and other case law cited in footnote 1. Accordingly, VW urges NHTSA to remove this term from its suggested definition.

Second, the Volkswagen Group believes that the fifth of the five-part definition proposed in the NPRM is unworkable. This definition shifts the emphasis from vehicle-based reporting to parts-based reporting. By so doing, NHTSA obviates the usefulness of an annual list of “substantially similar” foreign models and indeed renders such a list essentially meaningless. By doing so, the Agency runs the risk of violating the legal certainty principles afforded by such a list. Accordingly, VW urges NHTSA to remove the fifth of the five-part definition.

VW urges NHTSA to adopt the Alliance’s definition of “substantially similar vehicle” because this definition is clear, objective, and satisfies concerns of legal certainty and due process protections. Further, VW urges NHTSA to adopt a *definitive* list of covered vehicles. A *definitive* list of covered vehicles for which foreign recall reports are required could help satisfy the constitutional mandate of assuring legal certainty.

3. Definition of “Manufacturer”

Constitutional protections afforded by the fourteenth amendment (due process clause) as enunciated in *Chrysler* require a clear, objective definition of “manufacturer,” in particular because this definition will determine the identity of those entities required to report under TREAD and the regulations promulgated by NHTSA. The Volkswagen

Group supports all the comments submitted on this point by the Alliance. In addition, VW wishes to add the following comment.

VW strongly disagrees with the proposed definition of “manufacturer” to the extent that NHTSA - through TREAD - attempts to assert extraterritorial jurisdiction over vehicle manufacturers that do not manufacture vehicles for export to the United States (*see* 66 Fed.Reg. 51909). Nothing in the TREAD Act justifies such an assertion. Indeed, nothing in established case law justifies such an assertion. On the contrary, long-standing principles of international law *prohibit* NHTSA from exercising such jurisdiction, in particular extraterritorial criminal jurisdiction (as envisaged under the TREAD Act). In this vein, the Volkswagen Group refers NHTSA to the comments submitted by both the Alliance (*see* page 5 and attachment 10 of that submission) and the VW Group (*see* pp. 3-5 of that submission) in the context of the ANPRM for Early Warning. The VW Group urges NHTSA to follow long-standing recognized principles of international law and refrain from attempting to assert jurisdiction over entities with no nexus to the United States.

4. Meaning of the Statutory Requirement to Report within Five Days

Finally, VW strongly urges NHTSA to adopt the Alliance’s flexible approach to the five-day reporting requirement in order to appropriately reflect the realities associated with overseas information gathering, translation, and reporting. By properly construing the statutory term “five working days” to mean “five business days” in any of the foreign countries involved in the specific report at issue, NHTSA will allow reasonable accommodation of such events such as scheduled factory and headquarter shutdowns (which occur with regularity in foreign markets for a period of a week or more at one time) or multi-day holidays (which occur in some countries during times that the United States is not observing a holiday). VW urges NHTSA to consider these international realities and cultural differences in interpreting the “five business day” reporting requirement. VW also recognizes the importance of placing a cap on the number of U.S.

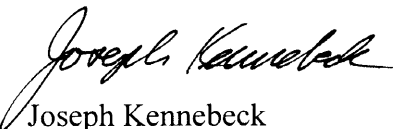
business days that could be included in such a flexible definition, so as to best balance the need for prompt reporting to NHTSA with the need to reflect international realities and cultural differences.

Conclusion

As NHTSA completes this rulemaking, the Volkswagen Group urges the Agency to meet its constitutional and statutory obligations as underscored in case law (best embodied in *Chrysler*). This means assuring legal certainty of the affected scope of those covered by the rule. Foreign nationals in various parts of the world, who are employed by entities that may or may not export to the United States, will have to be able to work with the requirements and be able to comply with its terms. These individuals may have no reason to be acquainted with the American legal system and its requirements and concepts. This fact underscores the importance of complying with constitutionally protected principles of legal certainty (*see Chrysler* and cases cited in footnote 1). NHTSA can fulfill this obligation by removing the vague and ambiguous terms identified in this letter and providing in their place terms that are clear and objective. Clear and objective definitions and standards have been provided by the Alliance and supplemented herein, in particular the definition of (1) “substantially similar” vehicle and (2) “manufacturer.”

Thank you for considering the VW Group comments.

Respectfully submitted,


Joseph Kennebeck